LOH SENG LEE

v.

YUNLEY ENTERPRISE SDN BHD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
ABU SAMAH NORDIN JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NOS: P-02-474-2007 & P-02-563-2007]
5 SEPTEMBER 2008

LAND LAW: *Charge - Sale of land - Decision by Land Administrator to auction two pieces of land together - Validity of auction - Estoppel and res judicata - Correct course of action - National Land Code, ss. 257(2), 263(3), 418(1), (3)*

BANKING: *Securities for advances - Charge - Sale of land - Decision by Land Administrator to auction two pieces of land together - Validity of auction - Estoppel and res judicata - Correct course of action - National Land Code, ss. 257(2), 263(3), 418(1), (3)*

CIVIL PROCEDURE: *Estoppel - Res judicata and issue estoppel - Application of - Relevant references to notes of proceedings of another High Court case*

The plaintiff/respondent was granted banking facilities by Malayan Banking Bhd ('MBB'), and charged two pieces of land as security. In default of payment, MBB commenced an action against the respondent and the guarantors at the Kuala Lumpur High Court ('Kuala Lumpur case'). At the same time, MBB also applied to the Land Administrator ('LA') for an order of sale of the charged lands and was successful on 24 September 2002. After many postponements of the public auction, the lands were finally sold to the appellant on 13 May 2005. On that same day, the respondent obtained an *ex parte* injunction restraining MBB from selling the lands by public auction, which *ex parte* order was subsequently dismissed after an *inter partes* hearing. On 19 August 2005, the respondent filed an originating summons at the Penang High Court seeking a declaration that the auction as well as the sale of the lands to the appellant was null and void. The application was successful whereupon the court granted a declaration that the public auction held on 13 May 2005 was invalid and further ordered the appellant to transfer the lands back

to the respondent. The judge found that as both lands were sold collectively, the sale was in breach of s. 263(3) of the National Land Code ('NLC') and thus invalid. He also opined that the issue of *estoppel* and *res judicata* were not applicable since there was no reference to the notes of proceedings from the Kuala Lumpur case during the hearing of the originating summons. The appellant, being dissatisfied, filed the present appeal against that decision.

Held (allowing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The decision or direction by the LA to auction the two pieces of land together was a decision within the definition of s. 418(3) of the NLC. On the proper reading of s. 418(1) of the NLC, the correct course of action for the respondent to take was to file an appeal, which it failed to undertake, instead of taking the circuitous route. On the facts, this court was satisfied that: (i) an order dated 2 July 2004 was misleading and had no correlation to the auction of 13 May 2005. The pleading thus was defective; (ii) the relevant order pertaining to the auction was an order dated 4 April 2005; (iii) the respondent never complained of all the three orders of sale, the reserved prices or even of that collective mode as reflected by the want of appeal under s. 418 of the NLC; (iv) no untoward act, failure to adhere to statutory procedures or evidence worthy of consideration was adduced to establish that the exercise of the auction on 13 May 2005 was tainted; (v) if the source of the auction *ie*, the order by the LA had caused the auction to be tainted then the failure to have the correct order pleaded should not be held against the appellant; and (vi) the respondent failed to supply a proper picture of the application in the originating summons. The erroneous view of the judge on the issue of *res judicata* and *estoppel*, and their want of application here, and the error committed when he took into account evidence from a previous unsuccessful injunction application merely punched more holes in his judgment. It merely exacerbated the respondent's already weakened position. Evidentially, the affidavits of the contesting parties contained sufficient relevant references to the Kuala Lumpur case. Furthermore, there were facts before the LA that justified the collective sale, bearing in mind that there were provisions that granted discretionary power to the LA under s. 257(2) of the NLC to sell the two adjoining pieces

of land either together or separately. Here, a factory building had already been erected on both pieces of land. Surely selling two pieces of land separately, while having a factory running across both of them, would lead to an absurd result, with two separate successful bidders sharing a building. There would be no end to the disputes arising from that hypothetical situation. Had an appeal been filed, all these matters could have been trashed out fully, but as stated above, that was not done. (paras 10, 11, 12, 13 & 14)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/responden telah diberi kemudahan perbankan oleh Malayan Banking Bhd ('MBB'), dan mengadai dua bidang tanah sebagai cagaran. Akibat dari kegagalan membuat bayaran, MBB memulakan suatu tindakan terhadap responden dan penggerenti-penggerenti di Mahkamah Tinggi Kuala Lumpur ('kes Kuala Lumpur'). Pada masa yang sama, MBB juga memohon ke Pentadbir Tanah ('PT') untuk suatu perintah jual tanah-tanah yang digadai itu and berjaya mendapatnya pada 24 September 2002. Selepas beberapa penangguhan lelong awam itu, tanah-tanah itu akhirnya dijual kepada perayu pada 13 Mei 2005. Pada hari yang sama itu, responden telah memperolehi sesuatu injunksi *ex parte* yang menyekatkan MBB dari menjual tanah-tanah itu melalui lelong awam, yang mana perintah *ex parte* itu kemudiannya ditolak selepas satu pembicaraan *inter partes*. Pada 19 Ogos 2005, responden memfail sesuatu saman permulaan di Mahkamah Tinggi Penang untuk mendapatkan satu deklarasi bahawa lelong dan juga jualan tanah-tanah itu kepada perayu adalah batal dan tak sah. Permohonan itu berjaya di mana mahkamah membenarkan suatu deklarasi bahawa lelong awam yang diadakan pada 13 Mei 2005 adalah tak sah dan juga mengarahkan perayu untuk pindahmilik tanah-tanah itu kepada responden. Hakim membuat keputusan bahawa oleh kerana kedua-dua tanah itu dijual bersama, jualan itu melanggari s. 263(3) Kanun Tanah Negara ('KTN') dan, oleh itu, tak sah. Beliau juga berpendapat bahawa isu *estoppel* dan *res judicata* tidak dapat digunakan kerana tiada apa-apa rujukan kepada nota prosiding dari kes Mahkamah Tinggi semasa pembicaraan saman permulaan itu. Perayu, berasa tidak puas hati, memfail rayuan ini terhadap keputusan itu.

Diputuskan (membenarkan rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Keputusan atau arahan oleh PT untuk melelong kedua-dua bidang tanah bersama-sama ialah satu keputusan dalam definasi s. 418(3) KTN. Atas bacaan betul s. 418(1) KTN, tindakan betul yang patut diambil oleh responden ialah untuk memfail suatu rayuan, yang beliau gagal membuat sedemikian, dan bukan mengambil jalan yang berpusing-pusing. Berdasarkan fakta-fakta, mahkamah ini berpuas hati bahawa: (i) suatu perintah bertarikh 2 Julai 2004 mengelirukan dan tiada hubung kait dengan lelong pada 13 Mei 2005. Pliding itu, oleh itu, merupakan cacat; (ii) perintah relevan yang berkaitan dengan lelong itu ialah satu perintah bertarikh 4 April 2005; (iii) responden tidak pernah mengadu tentang ketiga-tiga perintah jual, harga simpanan ataupun cara kolektif itu seperti yang ditunjuk oleh ketiadaan rayuan di bawah s. 418 KTN; (iv) tidak ada apa-apa perbuatan yang tidak diduga, kegagalan untuk mengikuti prosedur-prosedur statutori atau keterangan yang harus dipertimbangkan yang telah dikemukan untuk membuktikan bahawa perjalanan lelong pada 13 Mei 2005 itu telah menjadi cacat; (v) jika sumber lelong itu, iaitu, perintah oleh PT telah menyebabkan lelong itu menjadi cacat kegagalan untuk memplid perintah yang betul tidak seharusnya diambil kira terhadap perayu; dan (vi) responden gagal memberi gambaran yang betul tentang permohonan dalam saman permulaan itu. Pandangan khilaf hakim atas isu *res judicata* dan *estoppel*, dan ketiadaan permohonan mereka di sini, dan kekhilafan yang dilakukan bila beliau mengambil kira keterangan dari sesuatu permohonan injunksi sebelum ini yang gagal hanya menambahkan kesalahan dalam penghakimannya. Memandangkan keterangan, afidavit-afidavit pihak-pihak yang berlawanan mengandungi cukup rujukan-rujukan relevan kepada kes Kuala Lumpur. Tambahan lagi, terdapat fakta-fakta di hadapan PT yang menjustifikasikan jualan kolektif itu, memandangkan bahawa terdapat peruntukan-peruntukan yang memberi kuasa budi bicara kepada PT di bawah s. 257(2) KTN untuk menjual kedua-dua bidang tanah bersempadanan secara kolektif atau berasingan. Di sini, sebuah bangunan kilang telahpun didirikan di atas kedua-dua bidang tanah itu. Semestinya menjual kedua-dua bidang tanah itu secara berasingan, sementara ada sebuah kilang merentasi kedua-dua tanah itu,

akan mengakibatkan keputusan yang tidak munasabah, dengan dua pembida yang berjaya berkongsi satu bangunan. Tidak akan terdapat apa-apa penyudahan kepada pertikaian yang berbangkit dari situasi hipotesis itu. Jika sesuatu rayuan telah difailkan, semua perkara-perkara ini mungkin boleh diselesaikan dengan penuh, tetapi seperti yang dinyatakan di atas, itu tidak dibuat.

Case(s) referred to:

Land Executive Committee Of Federal Territory v. Syarikat Harper Gilfillan Berhad [1980] 1 LNS 150 FC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA ***(refd)***

Legislation referred to:

National Land Code, ss. 257(2), 260, 261, 262, 263(3), 264, 265, 418(1), (3)

(Civil Appeal No: P-02-474-2007)

For the appellant - SC Tan (CK Ung with him); M/s Cheong Wai Meng & Van Buerle

For the respondent - Dato' R Kamalanathan (Vinod R Kamalanathan with him); M/s Vinod Kamalanathan & Assoc

(Civil Appeal No: P-02-563-2007)

For the appellant - Lambert Rasa Ratnam (Mong Chung Seng with him); M/s Lee Hishammuddin Allen & Gledhill

For the 1st respondent - Dato' R Kamalanathan (Vinod R Kamalanathan with him); M/s Vinod Kamalanathan & Assoc

For the 2nd respondent - SC Tan (CK Ung with him); M/s Cheong Wai Meng & Van Buerle

[Appeal from High Court, Pulau Pinang; Originating Summons No: MT3-24-1279-2005]

[Editor's note: For the High Court judgment, please see Yunley Enterprise Sdn Bhd lwn. The Pacific Bank Bhd & Satu Lagi [2008] 9 CLJ 399.]

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar JCA:

[1] As these two appeals *viz*. P-02-474-07 and P-02-563-07 are interrelated, parties had decided that Rayuan Sivil P-02-563-2007 be heard first, with the outcome binding the other appeal. After

hearing the appeal, we unanimously allowed it with costs, and accordingly set aside the order of the High Court; and by agreement too, appeal P-02-474-07 was allowed with costs and the relevant consequential High Court orders were set aside. For ease of reference of this judgment, I shall allude to the facts and issues of the latter case as we go along.

[2] To appreciate the matter fully it is necessary that we reproduce the factual matrix followed thereafter by the antecedents that led to this appeal. Yunley Enterprise Sdn Bhd, the plaintiff in P-02-474-2007 (hereinafter referred to as the respondent) was granted banking facilities by the Pacific Bank Berhad (now known as Malayan Banking Berhad (MBB), and as security, charged two pieces of land (details in the intitulment), which form the subject matter of this appeal. In default of payment, MBB commenced an action at the Kuala Lumpur High Court *vide* suit number D2-22-158-1998 (hereinafter referred to as the Kuala Lumpur case) against the respondent and the guarantors. At the same time, MBB also commenced a foreclosure action by applying to the Land Administrator for an order of sale of the charged lands and was successful on 24 September 2002. After many postponements of the public auction, a sale finally took place at Seberang Perai Selatan Land Office on 13 May 2005, and the lands sold to Loh Seng Lee (hereinafter referred to as the appellant/successful bidder).

[3] On that same day that was on 13 May 2005, the respondent had filed an injunction application to restrain MBB from selling the lands by public auction, and successfully obtained an order on an *ex parte* basis. The *ex parte* order even though was served on the MBB was subsequently dismissed after an *inter parte* hearing.

[4] On 19 August 2005 the respondent filed an originating summons at the Penang High Court seeking a declaration that the auction as well as sale of the lands to the appellant was null and *void ab initio*. The grounds relied upon, *inter alia* were that the lands were wrongfully sold together in the same auction and that the application under Form 16G of the National Land Code 1965 was defective. The application was successful whereupon the court granted a declaration that the public auction held on 13 May 2005 was invalid and further ordered the appellant to transfer the lands back to the respondent. Being dissatisfied the successful bidder filed this appeal.

[5] The appellant's stance was simple. He ventilated that the Court should not intervene in the sale of the lands as the matter was clearly within the jurisdiction of the Land Administrator as conferred under ss. 260 to 265 of the National Land Code 1965. The High Court would only be seised of jurisdiction if there were an appeal by the respondent against the decision made by the Land Administrator under s. 418 of National Land Code 1965. In this case no such appeal was filed at the High Court.

[6] Further, the issues and facts raised by the respondent in the failed *inter parte* injunction application in the Kuala Lumpur case were essentially the same as those raised in the originating summons. When dismissing the injunction application on 30 August 2005, the Kuala Lumpur High Court had decided that there were no merits in the matters raised by the respondent. As there was no appeal against this decision the respondent should not be allowed to raise the same issues again to challenge the auction and sale of the charged lands. The appellant had correctly submitted that the principle of *res judicata* and issue of *estoppel* thus applied here. The appellant further added that the application for the order for sale, the auction, as well as the sale of the land had been properly conducted let alone he too had already paid the full purchase price to MBB.

[7] The respondent's main contentions, amongst others were as follows:

i. as the lands held Land Office titles they must be sold pursuant to ss. 260 and 263 of the National Land Code 1965 and must be offered for sale individually. This demand is provided for in s. 257(2) of the National Land Code 1965;

ii. by not auctioning the lands separately, MBB had failed in its fiduciary obligations, by not securing the best price or value for the lands thus reducing the amount allegedly being owed; and

iii. MBB's application dated 17 November 2003, for the order for sale pursuant to the public auction under Form16G of the National Land Code 1965 was defective and void in law. That application was supported by a statutory declaration, which was dated 15 July 1998, a document dated five years prior to when that Form 16G was prepared.

[8] Based on the above reasons the respondent ventilated that the impugned order thus was illegal or one that was a nullity pursuant to s. 263(3) of the National Land Code 1965 and therefore unenforceable.

[9] Having perused the learned judge's decision we noted that he had arrived at certain factual findings, *inter alia* that he had concluded that as both lands were sold collectively, the sale thus was in breach of s. 263(3) of the National Land Code 1965, and hence invalid and void. By selling the lands in that manner, the respondent was deprived of having the opportunity to redeem at least one of the lands or obtaining the best value and price. He also opined that the issue of estoppel and *res judicata* were not applicable, as there was no reference to the notes of proceedings from the Kuala Lumpur case during the hearing of the originating summons. The learned judge was of the opinion that he should not be restrained from hearing and deciding the issue raised before him. By MBB intentionally re-using the same instruments (Form 16D and Statutory Declaration) from a previous application, which had been cancelled, misrepresentation on the Land Administrator had taken place and as such the order for sale dated 4 April 2005 was invalid and void (*Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36).

[10] As stated above we had allowed the appeal. We were of the view that a decision or direction by the Land Administrator to auction the two pieces of land together was a 'decision' within the definition of s. 418(3) of the National Land Code 1965. On the proper reading of s. 418(1) of the National Land Code 1965, the correct course of action for the respondent to take was to file an appeal, of which it had failed to undertake, instead of taking the circuitous route (*Land Executive Committee Of Federal Territory v. Syarikat Harper Gilfillan Berhad* [1980] 1 LNS 150 FC).

[11] It was crystal clear that the application was for a declaration that the auction held on 13 May 2005 was *void ab initio* with the cause of action statement zeroing on Form 16G dated 17 November 2003 as the basis of the auction (RR 52 Jilid 1). Having perused the evidence we found this statement very misleading. The evidence showed that the very first order of sale obtained by MBB was on 24 September 2002, to be followed by the misleading order of 2 July 2004. As the properties could not be auctioned off under 24 September 2002 order MBB had no

choice but to put up another application, for order of sale (RR 113 of Jilid 1) on 17 November 2003, which order was granted on 3 June 2004. Again MBB failed to exploit this order of 3 June 2004. Due to that failure MBB had written in to the Land Office and in response the Land Office issued an order of sale dated 4 April 2005 (RR 584) which eventually led to 13 May 2005 auction.

[12] We were satisfied that:

i. the order dated 2 July 2004 is misleading and has no correlation to the auction of 13 May 2005. The pleading thus is defective;

ii. the relevant order pertaining to 13 May 2005 auction is the order of 4 April 2005;

iii. the respondent never complained of all the three orders of sale, the reserved prices or even of that collective mode as reflected by the want of appeal under s. 418 of the National Land Code 1965;

iv. no untoward act, failure to adhere to statutory procedures or evidence worthy of consideration was adduced to establish that the exercise of the auction on 13 May 2005 was tainted;

v. if the source of the auction ie the order by the Land Administrator had caused the auction to be tainted then the failure to have the correct order pleaded should not be held against the appellant; and

vi. the respondent failed to supply a proper picture of the application in the originating summons.

[13] The erroneous view of the learned judge on the issue of *res judicata* and estoppels, and their want of application here, and the error committed when he took into account evidence from a previous unsuccessful injunction application merely punched more holes in his judgment. It merely exacerbated the respondent's already weakened position (*OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534). Evidentially the affidavits of the contesting parties contained sufficient relevant references to the Kuala Lumpur case, as we found in the course of our scrutiny of the documents.

[14] The submission by learned counsel for the respondent, in the appeal before us, did not help his client's case either when the thrust of his argument was mostly directed at the collective sale order. Counsel had submitted that as the collective sale order was illegal it could thus be ignored even to the extent of leap-frogging s. 418 of the National Land Code 1965. We found this argument untenable as there were facts before the Land Administrator, which justified the collective sale, bearing in mind that there are provisions that grant discretionary power on the Land Administrator under s. 257(2) of the National Land Code 1965 to either sell together or separately the two adjoining pieces of land. Here a factory building had already been erected on both pieces of lands. Surely selling two pieces of land separately, while having a factory running across both of them, would lead to an absurd result, with two separate successful bidders sharing a building? There will be no end to the disputes arising from that hypothetical situation. Had an appeal been filed all these matters could have been trashed out fully, but as stated above, that was not done.

[15] Based on the above grounds, which certainly did not deserve detailed judicial activism, this panel had allowed the appeal with costs.